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[illegible] of the United States

October Term, 1991

Holywell Corporation, *et al.*,
Petitioners,

v.

Fred Stanton Smith, *et al.*,
Respondents.

United States Of America,
Petitioner,

v.

Fred Stanton Smith, *et al.*,
Respondents.

On Writs Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

[illegible] FOR RESPONDENT
THE BANK OF NEW YORK

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QUESTION PRESENTED

Whether the trustee of a liquidating trust, created solely to implement a confirmed plan of bankruptcy reorganization, is statutorily required to assume the post-confirmation tax responsibilities of the reorganized debtors.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-1361 and 90-1484

HOLYWELL CORPORATION, *et al.*,
Petitioners,
v.
FRED STANTON SMITH, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
FRED STANTON SMITH, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR RESPONDENT THE BANK OF NEW YORK

STATEMENT

1. The petitioners in No. 90-1361 are Theodore B. Gould ("Gould"); his wholly-owned corporation, Holywell Corpo-

ration ("Holywell"), and its subsidiary, Miami Center Corporation ("MCC"); and two partnerships that he likewise controls, Miami Center Limited Partnership ("MCLP") and Chopin Associates ("Chopin"). MCLP developed a real estate project in Florida called Miami Center, with financing from respondent The Bank of New York ("the Bank"). Pet. App. 2a.[1] Approximately 75% of MCLP was owned by Gould, Holywell and MCC. The balance of MCLP was owned by unrelated investors not involved in this proceeding. Chopin owned the land on which Miami Center was built (J.A. 35).

The business operations of Gould and his related entities were not limited to Miami Center. In 1984, Holywell had (besides debtor MCC) 19 other subsidiary corporations with which it filed a consolidated federal income tax return. These corporations were variously engaged in architectural and security services, engineering, equipment leasing, insurance, construction, hotel management, and building maintenance. Gould also was, alone or with Holywell, a partner in at least nine other partnerships with interests in real estate apart from Miami Center.[2]

2. On August 22, 1984, following default on the Bank's Miami Center loan, Gould, Holywell, MCC, MCLP, and Chopin (collectively, "the debtors") filed voluntary petitions under chapter 11 of the Bankruptcy Code.[3] Only these four

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[1] References to "Pet. App." are to the appendix to the petition for certiorari in No. 90-1361; references to "Bank App." are to the appendix attached to the Bank's brief in opposition; references to "J.A." are to the Joint Appendix filed with this Court; and references to "Bankr. C.P." are to the docketed court paper numbers in the bankruptcy court. A list of entities related to the Bank appears on page ii of its brief in opposition. *See* Sup. Ct. R. 29.1.

[2] *See* Bankr. C.P. 275-278. A schedule listing the various Gould entities not involved in this bankruptcy proceeding is attached as Appendix A.

[3] Unless otherwise noted, all references to the Bankruptcy Code

Gould-controlled entities filed petitions. Holywell's other 19 subsidiaries, as well as the other partnerships and joint ventures in which Gould and Holywell owned interests, continued to operate outside bankruptcy under Gould's direction.

No trustee was appointed to operate the business of any of the five debtors. Rather, each debtor served as representative of its own estate as "debtor in possession" under BC § 1107. In December 1984 and January 1985, certain properties ("the Washington properties") were sold by non-debtor entities in which Gould and Holywell owned interests. The proceeds of that sale were held pursuant to bankruptcy court order.[4]

3. In early 1985, the Bank proposed a consolidated plan of reorganization ("the plan") and the debtors proposed competing plans. The Bank's plan was overwhelmingly approved by the creditors and confirmed by the bankruptcy court. The plan stipulated the prompt sale of Miami Center to the Bank on previously agreed terms. The cash proceeds of that sale, along with proceeds of the Washington properties and recoveries from certain causes of action, were to be distributed in satisfaction of creditors' allowed claims, as detailed in the plan. J.A. 39, 41. The residue remaining after payment of such claims was to be returned to the discharged debtors (J.A. 47), who meantime remained in control of their records and operations.

The plan provided that distributions to creditors would be made through a specially-appointed "liquidating trustee." The liquidating trustee had various administrative powers over property subject to the plan, but he was forbidden to take any action that would change the debt-

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("BC") are to 11 U.S.C. § 101 *et seq.*, as in effect during the years at issue; and all references to the Internal Revenue Code ("IRC") are to 26 U.S.C. § 1 *et seq.*, as in effect during the years at issue.

[4] Bankr. C.P. 303. The Government's brief mistakenly states that the Washington properties were owned by Holywell (U.S. Br. 3).

ors' business. J.A. 41-43. He was given access to the debtors' records only for the limited purposes of carrying out the sale of Miami Center and of verifying, or objecting to, claims of creditors. J.A. 50. He had no access to the financial records of Holywell's non-debtor subsidiaries, and he had no role whatever in running the debtors' business.

Following the expiry of a stay obtained by the debtors, the confirmed plan became effective on October 10, 1985 (Pet. App. 30a). Respondent Smith, whose appointment as liquidating trustee became effective upon confirmation, thereupon became authorized to implement the plan. He closed the sale of Miami Center the same day.[5] Within 120 days thereafter, he had made distributions in full satisfaction of 90% of creditors' claims, including a distribution to the IRS of approximately $2.3 million (Bankr. C.P. 1254).

Had matters proceeded as expected, the balance of creditors' claims would have been paid in early 1986 and the residue of the assets promptly returned to the debtors. Instead, Gould commenced new lawsuits and appeals—more than 60 of them—in a effort to stop implementation of the plan.[6] While these actions have achieved little success on the merits, they have prevented the plan from being effected on schedule, and have caused the liquidating trust to remain in existence years longer than anticipated.

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[5] In return for the conveyance of Miami Center, the Bank released the debtors from liability on a judgment in its favor of $234 million, paid more than $11 million in cash, and released $30 million of cash collateral generated by sale of the Washington properties. *In re Holywell Corp.*, 901 F.2d 931, 932 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991). The Bank subsequently disposed of Miami Center at a loss of more than $70 million.

[6] In pursuit of such appeals, the debtors have filed ten petitions for certiorari in this Court alone, the first nine of which were denied. *See* Docket Nos. 87-1988, 87-1989, 88-80, 89-864, 89-708, 89-917, 90-676, 90-761 & 90-1551.

4. The plan did not provide for the liquidating trustee to assume any of the debtors' post-confirmation tax filing or payment responsibilities. The IRS was given copies of the proposed plans and disclosure statements and notice of the hearing on confirmation. It did not appear at the hearing or object to confirmation of the Bank's plan.

For two years after confirmation, the debtors took the position that they and not the liquidating trustee were responsible for filing federal income tax returns and paying any taxes due. Gould's accountants (J.A. 159) and his chief financial officer (J.A. 162) advised him that the liquidating trust was not a separate taxable entity, and that the discharged debtors should include on their own returns any income that the trustee received. In March 1987, Gould advised counsel for the trustee that interest income received on the trust's accounts for 1985 "has been reported as taxable income for 1985" by Holywell and the other debtors to which it was allocable. Gould similarly advised that "the interest income for 1986 will be reported separately" by each debtor. J.A. 161.[7]

Consistent with that position, Gould caused the filing, after confirmation, of a consolidated return for Holywell, MCC, and Holywell's 19 non-debtor subsidiaries for the tax years ending July 31, 1984 and July 31, 1985. On the latter return, he reported capital gain derived from sale of the Washington properties (J.A. 98; Pet. App. 3a). Gould also caused the post-confirmation filing of debtor MCLP's return for 1985, to which were attached IRS Forms K-1 showing the effects of the sale of Miami Center on the partners, including himself and Holywell. *See* Appellant Gould's Response, Exh. L & M (Nov. 22, 1989) (J.A. 24).

Throughout the post-confirmation period, Gould has controlled the information necessary to calculate his own tax

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[7] Although these discussions explicitly referred only to the interest income received by the trustee, there was no suggestion that gain or loss from the real estate sales should be treated differently.

liabilities and those of the reorganized corporations.[8] Moreover, Gould has vigorously resisted all efforts of the liquidating trustee to review financial records that would be necessary to prepare the tax returns at issue.[9] Respondent Smith has had no access to records of the 19 non-debtor subsidiaries with which Holywell has filed consolidated tax returns; no access to records of Gould's and Holywell's other non-debtor affiliates; and no access to records of the reorganized debtors' own post-confirmation activities.

Not until two years after the plan was confirmed did Gould take the position that the liquidating trustee should be filing returns and paying taxes for the reorganized debtors. To resolve the issue, respondent Smith initiated the adversary proceeding that has brought the case to this Court. The opinions of the three courts below holding that the liquidating trustee is not required to assume the debtors' post-confirmation tax responsibilities are described in respondent Smith's brief, and that description is not repeated here.

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[8] The liquidating trustee furnished Gould with monthly reports concerning income and expenses of the trust. *See, e.g.*, Appellant Gould's Response, Exh. N (Nov. 22, 1989) (J.A. 24). Gould likewise received original copies of IRS Forms 1099 reporting interest income paid by banks on the trust's investments.

[9] Gould and his entities have tenaciously resisted respondent Smith's efforts to obtain information even about matters indisputably within his authority, not to mention about the debtors' independent post-confirmation business or that of the 19 Holywell subsidiaries that never filed for bankruptcy. The district court, in fact, has recently reversed a bankruptcy court order requiring production of financial and other records of the non-debtor subsidiaries, in part on the ground that it was not established that the liquidating trustee had a claim for their assets. *Holywell Corp. v. Smith*, 118 B.R. 876 (S.D. Fla. 1990). In that opinion, the court specifically noted that the debtors had refused not only to produce information concerning the financial affairs of their wholly-owned subsidiaries, but also to produce records of their own post-confirmation financial transactions despite various orders compelling them to do so (118 B.R. at 876).

SUMMARY OF ARGUMENT

I. This case requires the Court to decide who bears the tax responsibilities for a reorganized debtor after confirmation of a chapter 11 plan. The instant plan created a post-confirmation liquidating trust which was to disburse funds to creditors and return the residue to Gould and his corporations. Petitioners conceded at trial that the trust itself is not separately taxable. The question, therefore, is who must file post-confirmation returns for Gould and his corporations after they have emerged from chapter 11 and resumed normal economic activity.

By interpreting the plan to require that the reorganized debtors take charge of these responsibilities, the courts below accurately reflected the parties' own expectations and their behavior at the relevant time. For more than two years following confirmation, the debtors insisted that they, not the liquidating trustee, should report on their own returns the income stemming from trust transactions. This scenario is hardly unusual under our tax law. Taxpayers are commonly required to report income attributable to transactions by entities in which they have an interest; to aggregate such income with their independent items of income and loss; and to pay the resulting tax out of their own separate funds. Indeed, the debtors themselves filed several post-confirmation returns before claiming that this duty was the liquidating trustee's.

It is axiomatic that a taxpayer's income must all appear on a single return; it cannot be split among several returns. *North American Oil Consolidated v. Burnet*, 286 U.S. 417, 423 (1932). Thus, if the trustee must file post-confirmation returns for the reorganized corporations, those returns could not be limited to items of interest and gain or loss originating from the trust. Rather, such returns would also have to include the income, deductions, and losses resulting from the separate post-confirmation activities of the reorganized corporations, the 19 non-debtor

subsidiaries with which Holywell files consolidated returns, and the various other ventures in which Holywell participates.

Requiring the liquidating trustee to file such returns would be both impractical and unfair. Respondent Smith has no control over the reorganized debtors, no knowledge of their post-confirmation activities, and no access to their financial records. He has had no role in operating the debtors' business, either before or after confirmation of the plan. It is not surprising that Gould finds attractive the prospect of the liquidating trust—in effect, his old creditors—paying the taxes of his reorganized corporations for so long as he, by vigorous litigation, can keep the trust from finishing its mission. But this outcome is scarcely compatible with sound administration of the tax and bankrupcty laws.

II. Petitioners do not challenge the lower courts' construction of the plan's terms. Rather, they contend that the reorganized debtors' tax obligations were shifted to the liquidating trustee solely by operation of law. None of the statutory bases on which they rely supports this contention.

A. Section 6012(b)(4) of the Internal Revenue Code provides that "[r]eturns of * * * a trust [or] an estate of an individual under chapter 7 or 11 of title 11" shall be filed "by the fiduciary thereof." This section applies only if respondent Smith is "the fiduciary" of a separate taxable entity—an individual "bankruptcy estate" or a "trust." As debtor in possession, however, Gould was "the fiduciary" of his own bankruptcy estate. And by the time the liquidating trust came into being, Gould's bankruptcy estate had ceased to exist, with the logical corollary that respondent Smith can never have been "the fiduciary" of that estate.

The debtors' argument, not joined by the Government, that the liquidating trustee is "the fiduciary" of a

separate taxable "trust" created in part for Gould's benefit is belied by their concession below that the trust is not separately taxable. That concession was correct. As an entity created to pay creditors' claims and return the residue to the debtors, the liquidating trust is, as the bankruptcy and district courts correctly held, a "grantor trust," whose income must appear directly on the debtors' own returns.

B. Section 6012(b)(3) applies "[i]n a case where a receiver, trustee in a case under title 11 * * * or assignee * * * has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated." It requires such a fiduciary to "make the return of income for such corporation in the same manner and form as corporations are required to make such returns." This provision does not apply here.

1. The liquidating trustee is not "a trustee in a case under title 11." Congress specifically stated its intention to conform the terminology of section 6012(b)(3) to that of the Bankruptcy Code. H.R. Rep. 833, 96th Cong., 2d Sess. 47-48 (1980). Under the Bankruptcy Code, "trustee in the case" is a term of art denoting the trustee appointed by a bankruptcy court to take charge of the debtor's estate and manage its business prior to confirmation of the plan (BC § 1104(a)). The liquidating trustee was concededly not so appointed.

Nor is the liquidating trustee a "receiver" or "assignee" within the meaning of section 6012(b)(3). These terms refer to persons who, outside the federal bankruptcy context, play a role similar to that of a "trustee in a case under title 11." In every instance where a fiduciary has been required to file corporate returns as a "receiver" or "assignee," that fiduciary was either (1) acting as a surrogate for an insolvent corporation with plenary powers to run its business, or (2) carrying out the process of

liquidating or dissolving the corporation. Receivers and assignees are fiduciaries *for the corporation* who act in the place of corporate management. By contrast, the liquidating trustee here was appointed to disburse specified assets to creditors while the reorganized corporations and their management continue to carry on business.

2. The statute's history confirms that it applies only where a fiduciary acts as a corporation's substitute or "alter ego" with plenary power to manage its affairs. Referring to the original version of what is now section 6012(b)(3), this Court pointed out that "[t]he language of the section contemplates a *substitution* of the receiver for the corporation." *North American Oil Consolidated v. Burnet*, *supra*, 286 U.S. at 422-423 (emphasis added). Regulations interpreting the same provision explained that a "receiver, trustee, or assignee" having custody of corporate assets "*stands in the place of the corporate officers* and is required to perform all the duties and assume all the liabilities which would devolve upon [them] were they in control." Regulations 33, Art. 209 (1918) (emphasis added). And regulations issued in 1919 on the subject of corporate liquidation similarly recognized that receivers or trustees in dissolution "stand in the stead of the corporation" for the purpose of liquidating its assets and paying its debts. Regulations 45, Art. 547 (1919). Nothing in the later history of the statute has changed this basic requirement.

In sum, section 6012(b)(3) and its predecessors have only been applied to fiduciaries, however denominated, who step into the shoes of corporate management and discharge all the duties that the corporate officers would otherwise perform—including the filing of tax returns. Respondent Smith does not represent the reorganized corporations and he in no sense "stands in the shoes" of their managers. He thus has no duty to file their tax returns.

III. Asserting that Gould and his corporations "evidently lack funds to satisfy the very substantial tax liabilities at issue" (U.S. Br. 13), the Government contends that those taxes will never be collected if the liquidating trustee does not file returns and pay them. This contention lacks any factual predicate in the record and in any event would not justify the result the Government seeks.

There is no record support for either of the Government's assertions—that Gould and his corporations owe a substantial tax or that they cannot pay from their own funds whatever tax they may owe. And even if practical collection problems had been shown to exist as to the particular debtors here, that would not be a reason to embrace the Government's anomalous statutory argument, which would apply perforce to all chapter 11 reorganizations.

The problem of which the Government complains, if real, is one of its own making. The IRS received notice of all proceedings in bankruptcy court, and standard IRS procedures require its personnel to review all proposed reorganization plans. The Service thus had ample opportunity to object and be heard on the terms of the plan and to appeal from the order of confirmation. Had it taken advantage of those practical opportunities, the IRS could have established in a concrete, fact-based context—and ultimately avoided—the collection problems it now urges on this Court.

Having failed to exercise the requisite diligence in bankruptcy court, the IRS now advances a strained statutory argument in an effort to collect the debtors' taxes from funds that the plan of reorganization explicitly reserves for *other creditors*. If this mode of collection is permitted, it will have extremely unsettling effects on the bankruptcy process. That process is one of negotiation and compromise; the IRS should not be permitted to absent itself from the negotiating table and then demand a form of

"super-priority" payment after the plan has been confirmed. Creditors' votes to confirm a plan are premised on the belief that it provides a fixed sum of money to meet their claims. If the IRS can sit on its hands and raid the pot after their votes are cast, bankruptcy reorganizations will be neither predictable nor just.

ARGUMENT

THE LIQUIDATING TRUSTEE IS NOT REQUIRED BY STATUTE TO ASSUME THE POST-CONFIRMATION TAX RESPONSIBILITIES OF THE REORGANIZED DEBTORS

This case requires the Court again to address the sometimes uneasy relationship between the bankruptcy and tax laws. Congress has often recognized that "the development of tax rules for bankruptcy and insolvency can involve accommodation of tax policy and bankruptcy concerns." 126 Cong. Rec. 34106 (1980) (Rep. Ullman). This case requires application of that principle in the context of deciding who bears the tax responsibilities for a discharged debtor following the confirmation of a reorganization plan in a chapter 11 proceeding.

The tax responsibilities at issue are those of the reorganized debtors—Gould and his entities—and not those of the liquidating trust. Petitioners conceded below that the trust is not a taxable entity obligated to file returns or pay tax on its own behalf. Rather, the taxpayers whose liabilities are at stake are Gould and the other reorganized debtors. It is undisputed that tax returns must be filed for them and that any taxes due must be paid. The only question is who is required to take care of these tax obligations during the period *after* the plan of reorganization is confirmed, when Gould and his entities emerge from chapter 11 and resume normal economic activity.

Three courts below have held that the reorganized debtors, following their discharge from bankruptcy, have the duty to file their own income tax returns and pay whatever

taxes they may owe. In seeking to overturn that result, the Government urges an inflexible rule whereby these tax obligations, as a matter of statutory compulsion, would be shifted from the discharged debtors to the liquidating trust for as many years as the trust remains in existence. As we shall show, the Government's position is at odds with general tax and bankruptcy principles and derives no support from the statutory provisions on which it relies. The Government's position, moreover, would lead to impractical and unfair results, for it would enable a successfully reorganized corporation in effect to transfer to its former creditors its post-bankruptcy tax liabilities.

I. The Court Of Appeals Properly Interpreted The Plan Of Reorganization To Make The Reorganized Debtors Responsible For Their Post-Confirmation Tax Obligations

A. Under General Tax And Bankruptcy Principles, A Discharged Debtor Is Responsible For Tax Duties That Arise After Confirmation

This Court has stressed that, in considering the interplay of the tax and the bankruptcy laws, it is essential to have in mind the "relevant periods to be considered." *Nicholas v. United States*, 384 U.S. 678, 686 (1966). Here, the period at issue is the period *after* confirmation of the plan for the debtors' reorganization under chapter 11 of the Bankruptcy Code.[10]

Confirmation of a chapter 11 plan represents the conclusion of the bankruptcy process for those debtors who,

[10] The plan was confirmed on August 8, 1985, with an effective date of October 10, 1985 (Pet. App. 30a). Holywell's tax return for its fiscal year ending July 31, 1985—the year during which the Washington properties were sold—was due (absent extensions) on October 15, 1985, five days after confirmation became effective. Holywell's tax return for its fiscal year ending July 31, 1986—the year during which Miami Center was sold—was due more than a year after confirmation.

like Gould and his entities, invoke that process successfully. Confirmation terminates the bankruptcy estate and revests in the reorganized debtor any assets not needed to pay creditors' claims (BC § 1141(b)). Upon discharge, the debtor resumes normal business activities relieved of the burden of most pre-confirmation debts (BC § 1141(d)(1)(A)). Indeed, if a debtor whose pre-confirmation assets are liquidated under a chapter 11 plan does not continue in business, confirmation of the plan does not operate as a discharge (BC § 1141(d)(3)).

Besides discharging the debtor, confirmation implements a program of payments to creditors from the former debtor's assets (BC § 1123(a)(5)). Once the plan has been confirmed, this distribution program proceeds in tandem with the debtor's resumption of normal economic activity. The Bankruptcy Code expressly allows the distribution process to be effected through entities specially created for that purpose, such as the liquidating trust here (BC §§ 1123(a)(5)(B), 1142(a)). These entities often remain in existence for many years after confirmation.[11] Indeed, it is not unusual under a chapter 11 plan for a debtor to have continuing obligations to make contributions toward payment of its former creditors. *See* 5 Collier *Bankruptcy Practice Guide* ¶ 90.06[4] (1991).

These normal consequences of a chapter 11 confirmation occurred here. When the plan was confirmed, Gould and his corporations resumed business activities free of bankruptcy-imposed constraints. At the same time, a mechanism was established, in the form of the liquidating trust, to make payments to creditors from the debtors' prior assets, with the residue being returned to the debtors once the distribution process was complete.

[11] *See, e.g., United States v. Energy Resources Co.*, 110 S.Ct. 2139, 2141 (1990) (special trust created to pay off debts during five-year period after confirmation). *Cf. In re A.H. Robins Co.*, 880 F.2d 769, 771 (4th Cir. 1989) (confirmed plan of reorganization created $2.3 billion trust to pay Dalkon Shield claims over period of years); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988) (confirmed plan of reorganization created trust to satisfy debtor's ongoing asbestos-related liabilities).

In the typical chapter 11 case, there can be no question that with the benefits of conducting business free of old debts necessarily go the normal burdens that in our society accompany economic activity, including liability for income taxes. Post-confirmation tax obligations are the responsibility of the discharged debtor. *United States v. Redmond*, 36 B.R. 932, 934 (D. Kan. 1984); *Matter of Patch Press, Inc.*, 71 B.R. 345, 347-348 (Bankr. W.D. Wisc. 1987); *In re Gyulafia*, 65 B.R. 913, 916-917 (Bankr. D. Kan. 1986); *In re Hirsch-Franklin Enterprises, Inc.*, 63 B.R. 864, 871-872 (Bankr. M.D. Ga. 1986); Rev. Rul. 69-641, 1969-2 C.B. 241 (receivership).

B. The Courts Below Properly Determined That The Plan Approved In This Case Comports With This General Rule

The courts below correctly interpreted the plan to require that post-confirmation responsibilities for filing the reorganized debtors' tax returns and paying any tax due should rest where tax responsibilities usually rest—with the taxpayers, not some third party. The plan contains no express provision concerning the tax duties at issue, and the court of appeals determined that no provision of the plan "can reasonably be interpreted as requiring the liquidating trustee to file income tax returns and pay income taxes" (Pet. App. 7a). Petitioners do not challenge this construction of the plan's terms, contending that the reorganized debtors' tax obligations were shifted to the liquidating trustee solely by operation of law.

By interpreting the plan to require that the reorganized debtors take charge of their own tax responsibilities, the courts below accurately reflected the parties' own expectations and their behavior at the relevant time. The plan

provided that Miami Center would be sold within 45 days of confirmation pursuant to a contract attached to the plan (J.A. 39); that the proceeds of that sale and of the earlier sale of the Washington properties would promptly be distributed to creditors as fixed in the plan (J.A. 40-41, 45-47); and that all remaining assets of the liquidating trust would then be returned to the reorganized debtors (J.A. 39, 47). This residue was expected to be substantial. It was to include stock owned by Holywell in 19 subsidiaries that had not filed for bankruptcy, as well as partnership and joint venture interests owned by Holywell and Gould individually. J.A. 30; Holywell Br. 2 n.1 & 4 n.5; App. A, *infra*. And it was to include the anticipated excess over creditors' claims of the sales proceeds and interest income received by the liquidating trust.[12]

At the time the plan was proposed and confirmed, there was every reason to believe that Gould and his entities, following their discharge, would be able to carry out the normal tax duties of any business operation.[13] The sale of Miami Center took place on the same day the plan was confirmed. Had the original expectation of a quick distribution not been frustrated by protracted litigation instigated by the debtors, the mandated payments to creditors would have been completed on schedule in a few months. The debtors would then have received back property having substantial value, including the property of Holywell with its business unchanged.[14] By the use of these assets and assets subsequently acquired, the reorganized debtors would have been in a position to pay any taxes that might have been due when income from the trust transactions was combined with items of income, deduction and loss realized by the debtors in their post-confirmation activities.

[12] The schedules filed by the debtors in September and December 1984 showed assets and equity well in excess of scheduled liabilities. *See* Bankr. C.P. 121, 275-278. The debtors' disclosure statements filed in connection with confirmation projected a residue in excess of $30 million. *See* Bankr. C.P. 377-381, 466-470.

[13] Contrary to the debtors' assertion (Holywell Br. 2-3), the proponents of the plan had no "secret intention" that the debtors' post-confirmation tax obligations should not be met. The proponents intended that those obligations would be met, but that the debtors themselves—who had control of the relevant tax records and complete knowledge of their post-confirmation affairs—would meet those obligations, not the creditors through the liquidating trust.

The debtors themselves evidently shared the expectation that they would be responsible for their own post-confirmation tax obligations. Gould was told by his tax advisers that he and his entities, and not the trust, should file the required post-confirmation tax returns (J.A. 159-60, 161, 163). Gould evidently has filed individual income tax returns throughout the period (J.A. 77, 99, 162). He caused the filing of returns for Miami Center Limited Partnership, one of the debtors in this proceeding; attached to one partnership return were IRS Forms K-1 showing the effects of the sale of Miami Center on the partners, including himself and Holywell. *See* page 5, *supra*. After confirmation of the plan, he filed a return for Holywell for the fiscal year ending July 31, 1984 (J.A. 98). And he filed belated returns for Holywell for the fiscal year ending July 31, 1985, both with the IRS and with Virginia tax authorities. Pet. App. 3a; Brief Amicus Curiae of California *et al.*, at 3 n.1.

In short, until long after the plan was confirmed, Gould and his entities gave every indication of understanding perfectly well that it was they who were responsible for filing their own post-confirmation returns. In 1986, Gould even objected to the liquidating trust's establishment of a reserve for potential federal income taxes on interest income, terming such a reserve "unwarranted" (J.A. 156, ¶ 11; *see also* J.A. 106). It was not until late in 1987 that Gould unexpectedly changed his tune.

[14] The plan forbids the liquidating trustee to change the business of any of the debtors (J.A. 43).

C. Shifting To The Liquidating Trustee Responsibility For The Debtors' Post-Confirmation Tax Duties Is Inconsistent With Basic Tax And Bankruptcy Principles And Is Unworkable In Practical Terms

The idea that after confirmation a reorganized chapter 11 debtor should carry on its business, not only relieved of prior debts, but with its future tax obligations shifted to its former creditors, would normally be dismissed as nonsensical, as well as grossly unfair. In seeking to make that idea plausible here, the Government emphasizes that the liquidating trustee made post-confirmation sales of realty formerly owned by the debtors and collected post-confirmation interest on funds held for distribution to creditors. These activities, as all parties agree, resulted in gross income to Gould and his entities. Since the trustee held the proceeds of these transactions, the Government asks, why shouldn't he file tax returns reporting the transactions and pay taxes on the income that the reorganized debtors were deemed to have received?

The short answer to this question is that Gould and his entities, following confirmation of the plan of reorganization, resumed a status indistinguishable from that of other taxpayers in our society. When chapter 11 works as it is supposed to, the discharged debtor moves on to new profit-seeking activity. With such activity go tax obligations, and those who have emerged from chapter 11 are no more immune from that principle than anyone else.[15]

Under the approach of the courts below, Gould and his corporations are required to prepare their own post-confirmation tax returns, reflecting on such returns both their own independent items of income and deduction and any trust activities that result in tax consequences for them. This scenario is hardly unusual under our tax law. Many taxpayers, besides earning wages and salary, have interests in trusts, estates, partnerships, and other entities that generate income tax consequences for them individually. As a result of transactions by such entities, taxpayers are often required to report income in amounts substantially larger than the cash distributions they currently receive.[16] Taxpayers, in short, are commonly required to report income attributable to transactions by entities in which they hold interests; to aggregate such income with their independent items of income and loss; and to pay the resulting tax out of their own separate funds.

Petitioners' proposal to shift these responsibilities to the liquidating trustee yields an abnormal and wholly impractical result. The liquidating trust is not separately taxable; the "taxpayers" are Gould and his reorganized corporations. It is axiomatic that a corporation's income must all appear on a single return; it cannot be split among several returns. *North American Oil Consolidated v. Burnet*, 286 U.S. 417, 423 (1932). Therefore, if the trustee must file post-confirmation returns for the reorganized corporations, those returns could not be limited to items of interest and gain or loss arising from the trust's transactions.

To the contrary: as the corporations proceed on their business enterprises, their new activities will necessarily

[15] The mere possession of sales proceeds and interest income belonging to the debtors, of course, is not sufficient to require the liquidating trustee to pay their taxes out of those sums. Apart from a few specialized contexts, there is no general "withholding requirement" for fiduciaries holding funds for others. *Cf.* IRC § 1445 (withholding of tax on disposition by foreign persons of U.S. real property interests); IRC § 3406 (back-up withholding on interest payments where taxpayer has failed to furnish identification number).

[16] For example, partners are taxed on their distributive share of partnership income regardless of their right to a current distribution. *See* IRC § 61(a)(13). A trust beneficiary is taxable on "income required to be distributed currently" under IRC §§ 652(a) and 662(a)(1), even though a legal dispute prevents actual payment. *See United States v. Higginson*, 238 F.2d 439 (1st Cir. 1956); Rev. Rul. 62-147, 1962-2 C.B. 151. Income from assets set aside in a "sinking fund" to retire indebtedness is taxable to the debtor even though the assets are controlled by a "trustee." Treas. Reg. § 1.61-13(b).

affect their tax situations. They will earn income, incur deductible expenses, buy and sell property, and realize gains and losses—all entirely independent of the liquidating trust. These separate activities must be reflected on their tax returns, whoever files them. Under petitioners' position, the liquidating trustee would be required to marshal information about the post-confirmation activities of Holywell and its 20 consolidated subsidiaries—a virtually impossible task given Gould's refusal to supply essential financial records. The trustee would also be required to pay *all* of the corporate debtors' taxes, not just the portion attributable to interest received by the trust and capital gain or loss realized on the Washington property and Miami Center sales.

Petitioners do not indicate when, if ever, the liquidating trustee would be free of the responsibility they would assign to him for taking care of the reorganized debtors' taxes. Presumably this duty would end when the trust terminates, but that date has been made highly uncertain by the actions of the discharged debtors themselves. Although intended to complete its work within a few months and return to the debtors substantial residual assets, the liquidating trust has now been in existence for six years, the delay being due chiefly to the debtors' litigiousness.

It is not surprising that Gould finds attractive the prospect of the liquidating trust—in effect, his old creditors—paying the taxes of his reorganized corporations for as long as he can, by vigorous litigation, keep the trust from finishing its mission. But this outcome is scarcely compatible with sound administration of the tax and bankruptcy laws. Petitioners urge a scenario under which a reorganized corporate debtor would embark on new businesses with its tax obligations shifted, for an indefinite period of time, to a liquidating trust with essentially fixed assets and prior obligations to other claimants. Because a liquidating trust may often have insufficient funds to satisfy a reorganized debtor's ongoing tax liabilities, it is by

no means clear that this outcome serves the Government's long-run interest. In any event, it is wholly inconsistent with basic tax principles, fundamental bankruptcy concepts, and common sense.

II. The Statutory Provisions On Which Petitioners Rely Do Not Require The Liquidating Trustee To Assume The Reorganized Debtors' Tax Duties

While acknowledging the general rule that reorganized debtors bear their own tax responsibilities, the Government in a particular case may have collection-based concerns that suggest the advisability of including special tax arrangements in the reorganization plan. We discuss below the various avenues that the IRS, a listed creditor in bankruptcy court, could have pursued had it wished to voice such concerns here. *See* pages 45-47, *infra*. Having failed to take advantage of these practical opportunities, the Government now advances a strained statutory argument—that the liquidating trustee, by operation of law, displaced the discharged debtors as the person legally responsible for filing their post-confirmation returns. This argument, if accepted, would shift the tax-filing duties in *all* bankruptcy reorganizations that employ trusts of this sort, even where collection of post-confirmation taxes from the debtors themselves is ensured.

For a rule so inflexible and so at odds with general tax and bankruptcy norms, the clearest statutory command should be required. The Government discerns such a mandate in section 6012(b) of the Internal Revenue Code, which covers "returns made by fiduciaries and receivers." The Government contends that section 6012(b)(4) requires the liquidating trustee to discharge the post-confirmation tax duties of Gould, the individual debtor; and that section 6012(b)(3) subjects the trustee to similar responsibilities on behalf of the corporate debtors. The debtors themselves, while not disavowing section 6012(b), place chief reliance on provisions of law outside the Internal Revenue Code.

As we shall show, none of the statutes on which petitioners rely furnishes the necessary justification.

A. Section 6012(b)(4) Of The Internal Revenue Code Does Not Require The Liquidating Trustee To Assume The Tax Duties Of The Reorganized Individual Debtor

Section 6012(b)(4) applies to "[r]eturns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code." It specifies that such returns are to be filed "by the fiduciary thereof." By its terms, section 6012(b)(4) can apply only where there exists a separate taxable entity—an estate, a trust, or an individual bankruptcy estate.

The Government and the debtors, while both relying on section 6012(b)(4), cannot agree on how it produces the result they desire. The Government contends that the liquidating trustee is the fiduciary of Gould's individual bankruptcy estate (U.S. Br. 31-36); the debtors contend that he is the fiduciary of a separate taxable trust (Holywell Br. 30). Neither contention is correct.

1. *The Liquidating Trustee Was Never "The Fiduciary" Of Gould's Bankruptcy Estate*

When Gould petitioned for relief under chapter 11, "an estate" was brought into being (BC § 541(a)). Under IRC § 1398, that estate was a separate taxable entity, distinct from Gould.[17] Since no trustee was appointed under BC § 1104, Gould was and remained, as the debtor in possession, "the fiduciary" of his own estate. Section 1107(a) of the Bankruptcy Code specifically provides, with exceptions not relevant here, that the debtor in possession "shall have all the rights * * * and powers, and shall perform all the functions and duties, * * * of a trustee serving in a case

[17] By contrast, no new tax entity was created when the corporate debtors filed their petitions (IRC § 1399).

under this chapter." *See CFTC v. Weintraub*, 471 U.S. 343, 355-356 (1985). Among Gould's duties as debtor in possession was the duty to file tax returns on behalf of his estate. *See* IRC § 1398(c)(1); BC §§ 323(a), 346(c)(2), 505(b), 1106(a)(6).[18]

When the plan of reorganization was confirmed, Gould's separate bankruptcy estate ceased to exist.[19] At that point,

[18] *See* Howard, *An Overview of the State and Federal Tax Responsibilities of Bankruptcy Trustees and Debtors*, 93 Comm. L.J. 43, 47 (1988) ("[W]here no trustee is appointed [in an individual chapter 11 case] the obligation to file returns is imposed on the debtor in possession."). The Government's brief wholly ignores Gould's status as debtor in possession; indeed, it seems to proceed on the erroneous assumption that a trustee is invariably appointed during the administrative phase of a chapter 11 case to operate the debtor's business. *See* U.S. Br. 33 ("When the debtor's property [is] transferred to the bankruptcy estate, the obligation to report and pay taxes * * * is placed on the trustee"); *id.* at 32 n.22 ("The trustee under chapter 7 or 11 who assumes the estate property reports income and pays taxes for the estate."). Contrary to the Government's apparent assumption, trustees under BC § 1104 are usually appointed only in cases of fraud, dishonesty, incompetence, or gross mismanagement by the debtor; the typical chapter 11 debtor serves as debtor in possession. *See* 5 L. King, *Collier on Bankruptcy* ¶ 1104.01 (15th ed. 1991) (citing cases).

[19] *E.g.*, *In re Westholt Manufacturing, Inc.*, 20 B.R. 368 (Bankr. D. Kan. 1982), *aff'd sub nom.*, *United States v. Redmond*, 36 B.R. 932 (D. Kan. 1984). Under BC § 1141(b), confirmation of the plan divests the estate of its assets, since "all of the property of the estate" then vests in the debtor "[e]xcept as otherwise provided in the plan or the order confirming the plan." The plan here vested "all property of the estate" in the liquidating trust with remainder to the debtors, and Gould's separate bankruptcy estate went out of existence. *See In re T.S.P. Industries*, 120 B.R. 107, 109 (Bankr. N.D. Ill. 1990); *In re W.R.M.J. Johnson Fruit Farm, Inc.*, 107 B.R. 18, 19 (Bankr. W.D.N.Y. 1989); *In re Grinsted*, 75 B.R. 2 (Bankr. D. Minn. 1985); *In re Natco Ind.*, 69 B.R. 418, 419 (S.D.N.Y. 1985); *Prince v. Clare*, 67 B.R. 270, 272 (N.D. Ill. 1986); *In re Balogun*, 56 B.R. 117, 118 (Bankr. M.D. Ala. 1985); *In re Barker Medical Co.*, 55 B.R. 435, 436 (Bankr. M.D. Ala. 1985); *In re Wood*, 47 B.R. 774, 777 (Bankr. W.D. Wisc. 1985); *Abbott v. Blackwelder Furniture Co.*, 33 B.R. 399 (W.D.N.C. 1983).

all of the estate's assets vested in the liquidating trust, with remainder to Gould after creditors were paid. Gould was, after October 10, 1985, once again an independent and responsible economic agent, freed of the duties that he had assumed as debtor in possession. And whereas prior to confirmation there existed two separate taxpayers—Gould and his bankruptcy estate—the relevant tax duties were unified upon confirmation in the hands of Gould personally.[20]

In short, there are two distinct reasons why respondent Smith is not "the fiduciary" of "an estate of an individual under chapter * * * 11" within the meaning of section 6012(b)(4). First, by the time the liquidating trust came into being, Gould's chapter 11 estate *had ceased to exist*, with the logical corollary that the liquidating trustee can never have been "the fiduciary" of that estate. Indeed, the debtors concede in a footnote that "the 'estate of an individual under Chapter 11' terminated upon confirmation of the Plan of Reorganization" (Holywell Br. 30-31 n.34). In view of that concession, the debtors understandably lack enthusiasm about the Government's argument on this point.

Second, for the entire period during which Gould's chapter 11 estate did exist, "the fiduciary" of that estate was Gould in his capacity as debtor in possession. The Government argues that the liquidating trustee possesses fiduciary powers and that "the term 'fiduciary' should be given its generic, ordinary meaning" (U.S. Br. 35). That is correct, but beside the point. Many individuals, including innumerable accountants and lawyers, have possessed fiduciary powers with respect to Gould's bankruptcy estate. But they are not therefore required to file tax returns on its behalf. Rather, returns of an individual's bankruptcy estate are to be filed "by *the fiduciary* thereof" (IRC§ 6012(b)(4) (emphasis added)). That fiduciary was plainly Gould himself as debtor in possession.[21]

[20] Whereas Gould's separate bankruptcy *estate* terminated at confirmation, the underlying bankruptcy *case* of course continues to the present time. Article XIV of the Plan provides that "[t]he Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan have been made and until the entry of final decree" (J.A. 52). Bankruptcy courts routinely retain post-confirmation jurisdiction over "cases under title 11" to ensure that the plan's purpose and intent are carried out. 5 L. King, *Collier on Bankruptcy* ¶ 1123.02[5], at 1123-23. *See Abbott v. Blackwelder Furniture Co.*, 33 B.R. at 402 (distinguishing between bankruptcy "estate" to be administered by trustee and bankruptcy "case" over which court may retain jurisdiction); *In re Westholt Manufacturing*, Inc., 20 B.R. at 372 (same).

2. *The Liquidating Trustee Is Not "The Fiduciary" Of A Separate Taxable Trust*

The debtors advance a different argument to support the application of section 6012(b)(4) to Gould individually. They contend that the liquidating trustee is "the fiduciary" of a separate taxable "trust" created in part for Gould's benefit (Holywell Br. 30). The half-hearted character of this argument—it occupies a single paragraph in their brief—reflects the fact that it represents a complete re-

[21] The cases cited by the Government for the proposition that a "liquidating trustee" should shoulder a former debtor's tax obligations are wholly inapposite. *See* U.S. Br. 36, *citing In re Bentley*, 916 F.2d 431 (8th Cir. 1990), and *In re Joplin*, 882 F.2d 1507 (10th Cir. 1989). Both cases involve liquidating bankruptcies under chapter 7 (entitled "Liquidation"), in which a trustee is invariably appointed to dispose of the debtor's assets, and in which there can be no "debtor in possession." *See* BC §§ 701-704. In chapter 7 cases, the trustee is clearly "the fiduciary" of the individual bankruptcy estate; just as obviously, the debtor in possession is "the fiduciary" of the chapter 11 estate involved here. In describing the trustee in *Joplin* as a "liquidating trustee" (U.S. Br. 36), the Government seeks to draw a bogus parallel between that case and this. The *Joplin* trustee was a "liquidating trustee" in the sense that he was appointed as statutory trustee to conduct a chapter 7 liquidation. In the present case, by contrast, no statutory trustee was appointed for the chapter 11 estate, and Gould remained debtor in possession; respondent Smith is a "liquidating trustee" only in the sense that he was appointed post-confirmation to disburse funds to Gould's creditors.

versal of the debtors' position below. Both the Government and the debtors conceded in bankruptcy court that "the trust is not a separate taxable entity" (Pet. App. 30a). Rather, as all parties have heretofore agreed, the taxpayers whose obligations are at issue are Gould and his corporations. Because the liquidating trust is not separately taxable, it is not required to file tax returns reporting the income at issue.

The reason why the liquidating trust is not separately taxable is that it is a "grantor trust," as the bankruptcy and district courts correctly held (Pet. App. 24a-25a, 33a-36a). As a general rule, trusts and estates are legal entities subject to tax. *See* IRC § 641(a). But the Internal Revenue Code carves out one species of trust—so-called "grantor trusts"—as to which the settlor or "grantor," rather than the trust, is treated as "the owner" of the subject property. As deemed "owner" of the property, the grantor—here, the reorganized debtor—is taxable directly on the income it generates. *See* IRC §§ 671, 672-679.[22]

Trusts are classified as "grantor trusts" in a number of commonly-arising situations. These include circumstances where the grantor retains a 5% or larger reversionary interest in the corpus (IRC § 673) or where trust income may be distributed to the grantor on a current or accumulated basis (IRC § 677). A "distribution" is deemed to occur if trust income may be used to discharge the grantor's legal obligations. Treas. Reg. § 1.677(a)-1(d); *see, e.g.*, *Douglas v. Willcuts*, 296 U.S. 1 (1935). This means that where, as here, assets are set aside to pay creditors and the debtor-settlor remains entitled to the surplus, if the

[22] Because "grantor trust" items are not taxable to the trust, they are not shown on the trust's return, but on an "attached statement." Treas. Reg. § 1.671-4.

arrangement constitutes a trust for tax purposes, it will be a grantor trust.[23]

Seeking to challenge this result, the debtors assert that the grantor trust provisions apply only in the case of a "voluntary, donative transfer" (Holywell Br. 48, 49). This assertion is plainly incorrect. The grantor trust provisions have regularly been applied in commercial, non-donative contexts,[24] including the bankruptcy context.[25] Whether a transfer is "voluntary" is wholly irrelevant for this purpose.[26] The case that petitioners cite for the contrary proposition—*DePinto v. United States*, 585 F.2d 405 (9th Cir. 1978)—correctly held that an individual's *bankruptcy estate* is not a grantor trust. That holding lends no support to the debtors' assertion that the grantor trust provisions do not apply in bankruptcy cases at all.

The fact that the liquidating trust is a "grantor trust" may not be a complete answer to the question presented

[23] *E.g.*, *Stockton v. United States*, 335 F. Supp. 984 (C.D. Cal. 1971); *In re Sonner*, 53 B.R. 859 (Bankr. E.D. Va. 1985); *see also Federation Bank & Trust Co. v. Commissioner*, 27 T.C. 960 (1957), *aff'd*, 256 F.2d 764 (2d Cir. 1958). If assets are set aside to secure an obligation to pay creditors and the arrangement does not rise to the level of a trust, the same result obtains without recourse to the grantor trust rules. In that event, the assets would simply remain the property of the debtor, to whom the income would be taxed under ordinary tax principles.

[24] *E.g.*, *Douglas v. Willcuts*, 296 U.S. 1 (1935) (alimony trust); *Anesthesia Service Medical Group, Inc. v. Commissioner*, 825 F.2d 241 (9th Cir. 1987), *aff'g* 85 T.C. 1031 (1985) (malpractice self-insurance trust); *Rusoff v. Commissioner*, 65 T.C. 459 (1975), *aff'd*, 77-1 U.S.T.C. ¶ 9338 (2d Cir. 1977) (trust formed to exploit cigarette filter patent); Rev. Rul. 85-158, 1985-2 C.B. 175 (trust to secure commodity clearinghouse obligations); Rev. Rul. 77-230, 1977-2 C.B. 214 (trust to secure obligation to tort claimant); Rev. Rul. 61-175, 1961-2 C.B. 128 (investment vehicle for bank consortium).

[25] *In re Sonner*, 53 B.R. 859 (Bankr. E.D. Va. 1985) (applying grantor trust provisions to a post-confirmation liquidating trust).

[26] *Vreeland v. Commissioner*, 16 T.C. 1041, 1048-1049 (1951).

here. Given that Gould and his entities are directly taxable on the trust's income as "the owners" of its assets, section 6012(b) must still be considered in determining whether the liquidating trustee can be required to file returns and pay tax on their behalf. However, the fact that the liquidating trust is a "grantor trust" does dispose of the issue raised by the debtors' eleventh-hour reconstruction of section 6012(b)(4). Contrary to their submission, the liquidating trustee is not required to assume Gould's individual tax obligations as "the fiduciary" of a separate taxable trust.[27]

B. Section 6012(b)(3) Of The Internal Revenue Code Does Not Require The Liquidating Trustee To Assume The Tax Duties Of The Reorganized Corporate Debtors

Section 6012(b)(3) applies "[i]n a case where a receiver, trustee in a case under title 11 of the United States Code or assignee * * * has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated." In such circumstances, section 6012(b)(3) provides that the "receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns."[28]

[27] Although the debtors resist classification of the liquidating trust as a grantor trust, neither they nor the Government offers any other rationale to explain why the trust is not a separate taxable entity, as all parties conceded below. Moreover, the debtors wholly ignore the ramifications of their new "trust" theory. If the trust *were* a separate taxable entity, it would be such with respect to *all* the trust beneficiaries, corporate as well as individual; that would make resort to section 6012(b)(3) wholly unnecessary as applied to the corporate debtors. The debtors likewise ignore the fact that separate-entity status for the trust would entail an entirely different regime of taxation under IRC §§ 641-668, which govern taxation of trusts and their beneficiaries.

[28] By its terms, section 6012(b)(3) is restricted to returns of *corporations*. Thus, all parties agree that the relevance of this section is limited to determining the proper person to file returns for the reorganized corporations, namely Holywell and MCC.

The court of appeals properly construed this provision to apply in situations where a fiduciary steps into the shoes of a taxpayer—where he has plenary power to manage the taxpayer's affairs and acts as the taxpayer's substitute or "alter ego." Because the liquidating trustee's powers are limited to disposing of certain trust assets and returning the balance to the debtors, and because he has no power to represent or act for the reorganized corporations, the court of appeals held that he is not required to file their tax returns under section 6012(b)(3). As we shall show, the court of appeals' construction of the statute is consistent with its language and history, with prior judicial interpretations, and with common sense.

1. *The Liquidating Trustee Is Not "A Trustee In A Case Under Title 11"*

The court of appeals held that the term "trustee in a case under title 11," as used in section 6012(b)(3), is a term of art denoting the trustee appointed by a bankruptcy court to take charge of the debtor's estate and manage its business prior to confirmation of the plan. That holding, far from being the exercise in judicial invention that petitioners imagine, precisely reflects the terms and terminology of the relevant statutes. In particular, the court of appeals properly adopted as the meaning of "trustee in a case under title 11" the specialized meaning of "trustee in a case under this title," the equivalent term used in title 11, the Bankruptcy Code itself.

a. The term "trustee in a case under this title" (or its equivalent, "trustee in the case") is invariably used in title 11 to mean a trustee appointed to manage the debtor's estate after the bankruptcy petition is filed. Section 322(a), entitled "Qualification of Trustee," catalogues the seven particular provisions of the Bankruptcy Code under which a person may be selected "to serve as trustee

in a case under this title." Each of those sections deals with the installation in office of a pre-confirmation trustee with broad management powers over the debtor's estate.[29]

The general qualifications, powers, and duties of a "trustee in a case under title 11" are set out in chapters 3 and 5 of that title.[30] Section 323, entitled "Role and Capacity of Trustee," specifically defines "[t]he trustee in a case under this title" as "the representative of the estate." Chapters 7, 11, 12, and 13 lay out alternative bankruptcy options for private persons; each permits or requires the appointment of an official to manage the debtor's estate during the proceeding, and each specifically refers to that official as the "trustee in a case under this title" or

[29] *See* BC § 701 (specifying procedure for appointing "interim trustee in the case" under chapter 7 and stating that such person "is a trustee in a case under this title"); BC § 702 (same, creditor vote to elect "trustee in the case"); BC § 703 (same, appointment of successor to serve as "trustee in the case"); BC § 1104 (specifying procedure for appointing "trustee in the case" under chapter 11); BC § 1163 (specifying procedure for appointing "trustee in the case" in railroad reorganizations); BC § 1202(a) (specifying procedure for appointing "trustee in the case" under chapter 12 family-farmer proceeding); BC § 1302(a) (specifying procedure for appointing "trustee in the case" under chapter 13 wage-earner proceeding). *Cf.* BC § 1107(a) (debtor in possession has, with certain limited exceptions, all rights and duties "of a trustee serving in a case under this chapter").

[30] *E.g.*, BC §§ 321 (eligibility); 322 (qualification); 323 (role and capacity); 324 (removal); 325 (vacancy); 326, 330, and 331 (compensation); 327 (employment of professionals); 343 (power of examination of the debtor); 345 (power of handling funds of the estate); 347 (rights over unclaimed property); 361 (duty to protect estate interest in property); 363 (power to use, sell, or lease estate property); 364 (power of obtaining credit); 365 (power over executory contracts); 544 (power to avoid transfers); 545 (power to avoid liens); 547 (power to recover preferences); 548 (power to avoid fraudulent conveyances); 549 (power to avoid post-petition transfers); 553 (power to recover offsets); and 554 (power to abandon debtor's property). Section 103(a) of the Bankruptcy Code makes the provisions of chapters 1, 3, and 5 applicable to cases under chapter 7, 11, 12, and 13. (No "trustee in the case" can be appointed in chapter 9, dealing with municipal bankruptcy.)

"trustee in the case." The trustee's detailed powers and duties vary somewhat from chapter to chapter, but in each instance the repository of these functions is the one individual holding the office of "trustee in the case."

Section 1104 governs the appointment of a "trustee in a case under this title" in a proceeding under chapter 11, the part of the Bankruptcy Code invoked by the debtors here. A chapter 11 trustee is normally appointed "for cause, including fraud, dishonesty, incompetence, or gross mismanagement" by the debtor's officers (BC § 1104(a)(1)). This trustee must be appointed during the administrative phase of the case, that is, "[a]t any time after the commencement of the case *but before confirmation of a plan*" (BC § 1104(a) (emphasis added)). Upon appointment, the trustee replaces the debtor in possession and assumes comprehensive management of the debtor's business. His powers are spelled out in section 1106 by reference to provisions of chapter 7 that govern the powers of the "trustee in the case."[31]

b. The court of appeals correctly held that the term "trustee in a case under title 11," as used in section 6012(b)(3), has the same meaning that it has in the Bankruptcy Code, namely, a trustee who steps into the debtor's shoes with plenary powers to manage its business and

[31] The term "trustee" as used in the Bankruptcy Rules likewise refers exclusively to a pre-confirmation trustee endowed with plenary powers over the debtor's estate. *E.g.*, Rule 1019(5) (requiring "debtor in possession or trustee" to turn over records and property of estate to chapter 7 trustee in conversion case); Rule 2015 (requiring "trustee or debtor in possession" to keep records, make reports and give notice); Rule 6009 (authorizing "trustee or debtor in possession" to prosecute and defend actions on behalf of debtor or estate); Rule X-1007(b) (requiring "[a] trustee or debtor in possession" to cooperate with the United States Trustee); Rule 2002, Adv. Comm. Note (stating that, in lieu of notice by clerk, the court may order "the trustee or debtor in possession" to transmit notices).

property.[32] Where a tax statute borrows a term of art from another law, it is a reasonable inference that Congress intends the words to mean the same thing. *Cf. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989). That inference is mandatory here, because Congress specifically stated its intention in this respect.

The term "trustee in a case under title 11" was inserted into section 6012(b)(3) as a part of the Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(i)(5), 94 Stat. 3410. Prior to this amendment, the statute had referred to a "trustee in bankruptcy" (26 U.S.C. § 6012(b)(3) (1976)). The legislative history explains that the change was one of several "technical and conforming amendments" designed "to substitute references to bankruptcy cases under new title 11 of the U.S. Code for references to bankruptcy proceedings under the now-repealed Bankruptcy Act." S. Rep. 1035, 96th Cong., 2d Sess. 52 (1980). The amendment to section 6012(b)(3) in particular was described as "substituting a reference to a trustee in a bankruptcy case under new 11 U.S. Code" for the previous reference to "trustee in bankruptcy," the equivalent term used in the old Bankruptcy Act. *Id.* at 53; *accord*, H.R. Rep. 833, 96th Cong., 2d Sess. 47-48 (1980).[33] This makes it perfectly clear

[32] The court of appeals ruled that "section 6012 refers only to trustees who are appointed under chapter 11 of the Bankruptcy Code" (Pet. App. 11a). The debtors criticize this statement, asserting that the court "confused *title* 11 * * * with *chapter* 11" (Pet. 15). This criticism is unjustified: since this is a chapter 11 case, the court naturally focused on what section 6012(b)(3) means in the chapter 11 context. Nothing in its opinion suggests that it intended to exclude trustees appointed under chapters 7, 12, or 13 of the Bankruptcy Code from the definition of "trustee in a case under title 11."

[33] As used in the Bankruptcy Act of 1898, the term "trustee in bankruptcy" referred to trustees appointed with comprehensive management powers over the debtor's affairs. *See, e.g.*, *Butner v. United States*, 440 U.S. 48 (1979); *Otte v. United States*, 419 U.S. 43 (1974); and *Kokoszka v. Belford*, 417 U.S. 642 (1974).

that Congress intended to conform the terminology of section 6012(b)(3) to that of the Bankruptcy Code.

c. The statute's earlier history confirms the conclusion that "trustee in a case under title 11" refers to a bankruptcy trustee who acts as surrogate for the debtor with full power to manage its affairs. Section 6012(b)(3) originated as section 13(c) of the Revenue Act of 1916, ch. 463, 39 Stat. 756. It applied to "receivers, trustees in bankruptcy, or assignees" who were "operating the property or business of corporations." It required those persons to "make returns of net income *as and for* such corporations * * *, in the same manner and form as such [corporations are] required to make returns" (39 Stat. 771 (emphasis added)).

Section 13(c) was enacted in response to this Court's decision in *United States v. Whitridge*, 231 U.S. 144 (1913). The Court there held that corporations in receivership were immune from tax under the 1909 corporate tax law, on the theory that the receivers who operated the corporations' railway business "did this as officers of the court * * * not as officers of the respective corporations" (231 U.S. at 149). Section 13(c) overturned this result by providing that *surrogates* for a corporation—whether in bankruptcy, receivership, corporate dissolution, or state-law insolvency proceedings—were to be taxed as if they were the corporation itself. Early regulations made this intention clear:

> When a corporation is dissolved its affairs are usually wound up by a receiver or trustee in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees *stand in the stead of the corporation* for such purposes. Any sales of property by them are to be treated *as if made by the corporation* for the purpose of ascertaining the gain or loss.

Regulations 45, Art. 547 (1919) (emphasis added).

Consistent with this history, the courts have applied section 6012(b)(3) in bankruptcy cases exclusively to pre-confirmation trustees who step into the shoes of a corporation with comprehensive power to manage its operations.[34] The Government and the debtors have cited no case, and our research has discovered none, in which a court construed "trustee in bankruptcy" or "trustee in a case under title 11" to apply to a person who was *not* a statutory trustee, or who functioned solely in the post-confirmation context, or who possessed the limited powers and duties of the liquidating trustee here.

d. Respondent Smith in no sense "stands in the stead of" the debtor corporations and he is clearly not "a trustee in a case under title 11" as that term is used in section 6012(b)(3). Respondent Smith was not appointed as the "trustee in the case" to administer the debtors' estates during the pre-confirmation phase of the bankruptcy proceeding. To the contrary: his job is to disburse funds from a trust established *after* confirmation of the plan. His powers are those useful in carrying out this limited post-confirmation task; they are vastly inferior to the powers that

[34] Most of the bankruptcy cases cited by petitioners concern disputes over whether a "trustee in bankruptcy" was operating the debtor's business or engaged in mere liquidating activities—a distinction that was relevant under the pre-1954 version of section 6012(b)(3). *See, e.g., United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959); *United States v. Metcalf*, 131 F.2d 677 (9th Cir. 1942), *cert. denied*, 318 U.S. 769 (1943); *see also Security-First Nat'l Bank v. United States*, 153 F.2d 563 (9th Cir. 1946) (holding that taxes imposed on a "trustee in bankruptcy" were payable as expenses of administration). The courts subsequently held that the "operating vs. liquidating" distinction did not survive the 1954 amendments. *E.g., In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974). The court held in *In re Sapphire S.S. Lines, Inc.*, 762 F.2d 13 (2d Cir. 1985), that a bankruptcy trustee was required to make quarterly payments of estimated tax, the trustee having conceded the application of section 6012(b)(3). In none of these cases was section 6012(b)(3) applied to a person other than a statutory trustee.

would have been conveyed had a "trustee in the case" been appointed under BC § 1104(a) to oust the debtors in possession from their estates. *See* BC § 1106, 1108.[35]

Most importantly, the liquidating trustee is not now and has never been "the representative of the estate" (BC § 323(a)), the central function of "a trustee in a case under title 11." By the time respondent Smith was appointed, the debtors' bankruptcy estates had terminated. The debtor corporations had been discharged from bankruptcy and regained full control of their own activities. Far from being a *surrogate* for the reorganized debtors, the liquidating trustee has absolutely no say in their business. His powers and duties are strictly confined to the liquidating trust.

Whereas it makes perfect sense for a "trustee in a case under title 11" to file tax returns on behalf of a corporation in bankruptcy, it makes no sense for respondent Smith to file tax returns on behalf of the reorganized debtors here. A "trustee in the case" under chapter 11 *represents* the corporation and has complete dominion over its affairs. This authority necessarily encompasses the filing of tax returns; indeed, where previous management has been ousted, there would be no one who *could* file the corporation's returns if the statutory trustee did not do so.[36]

[35] Significantly, one of the main duties assigned the "trustee in the case" under chapter 11 is the duty to file a reorganization plan. *See* BC §§ 1106(a)(5), 1121. The liquidating trustee obviously did not have as one of his duties the filing of the plan that led to his appointment.

[36] *See* Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Income Tax Liabilities of the Estate and the Debtor*, 72 Mich. L. Rev. 938, 975-976 (1974) ("[Since] the corporate officers and accounting personnel will no longer be on the payroll, * * * they can hardly be expected to undertake without compensation the task of preparing a return that, by law, is not their obligation but that of their former employer. Congress has elected to charge the trustee, as one of his duties, with the obligation to prepare the return 'for such corporation,' and, since the trustee will have or can get possession of the

Precisely the opposite situation exists here. The reorganized debtors have emerged from bankruptcy with their own managers in place. These managers have complete control over the corporate books and records and thus possess thorough knowledge of the corporations' affairs. These managers were responsible for satisfying the corporations' tax obligations prior to bankruptcy. They were responsible, as debtors in possession, for satisfying the corporations' tax obligations during administration of the chapter 11 estates. And they are the only ones capable of continuing to satisfy the corporations' tax obligations now that the plan of reorganization has been confirmed.

The liquidating trustee, by contrast, had no involvement in the debtors' pre-confirmation tax affairs, has no knowledge of their post-confirmation business, and has no practical way of securing relevant tax information from them. During the six years of the trust's existence, respondent Smith has had "control" of only two items of corporate income: sales proceeds received during 1984-1985, and interest received during 1985-1991. Given his exceptionally narrow window on the reorganized debtors' tax universe, he is in no position to displace their managers as the person responsible for filing their tax returns.

e. The Government argues (U.S. Br. 20-22) that since the liquidating trustee is a trustee, and since this case arises under title 11, respondent Smith is necessarily "a trustee in a case under title 11." This syllogism has nothing but its simplicity to recommend it. It ignores the fact that "trustee in a case under this title" is a term of art in the Bankruptcy Code, used in the chapter 11 context to refer exclusively to a trustee appointed under section 1104(a) to serve as plenary pre-confirmation representative of the estate. *See* pages 29-31, *supra*.

books and records * * * and will be employing the personnel who remain connected with the business, he is the only one in a position to make a return.")

Equally telling, the Government's syllogism ignores the fact that the Bankruptcy Code explicitly provides, in a separate section (BC § 1123), for a distinct category of trustee—denominated a "trustee under the plan"—whose responsibilities, like those of respondent Smith, are limited to duties incident to implementing a chapter 11 plan. Section 1123, entitled "Contents of Plan," states that "a plan shall * * * provide adequate means for the plan's implementation" (BC § 1123(a)(5)). A number of appropriate implementing devices are listed, including the "transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan" (BC § 1123(a)(5)(B)). The term "entity" is elsewhere defined to include "trust" (BC § 101(14)). Section 1123(a)(7) then provides that the plan may include provisions, consistent with claimants' interests and public policy, specifying "the manner of selection of any officer, director, or *trustee under the plan*" (emphasis added). The order appointing the liquidating trustee here notes that he was "to serve as trustee under the Bank's Plan." Bankr. C.P. 916.

In short, it was to the position of "trustee under the plan," and not to that of "trustee in the case," that respondent Smith was appointed. Only by ignoring the terminology, history, and intent of the key Bankruptcy Code provisions can the Government seek to characterize him as a "trustee in a case under title 11."

2. *The Liquidating Trustee Is Not A "Receiver" or "Assignee"*

As a secondary position, the Government maintains that the liquidating trustee, even if he is not a "trustee in a case under title 11," is nevertheless required to file returns under section 6012(b)(3) as a "receiver" or "assignee" of the debtor corporations. The authorities that the Government cites provide no support for this position. In every instance where a fiduciary has been required to file returns

as a "receiver" or "assignee," that fiduciary (1) was acting as a surrogate for the corporation with plenary powers to run its business, or (2) was carrying out a process that involved ending the corporation's existence. Each such fiduciary—whether styled a "receiver," "assignee for the benefit of creditors," "trustee in dissolution," or "liquidating trustee"—stood in the shoes of corporate management and thus held a status *equivalent to* that of a "trustee in a case under title 11." The courts, in other words, have correctly interpreted the terms of section 6012(b)(3) as being *in pari materia*. They have never required a limited-purpose fiduciary, like the liquidating trustee here, to file returns for a corporation that has successfully emerged from federal bankruptcy proceedings.

a. The terms "receiver" and "assignee," as used in section 6012(b)(3) and its predecessors, have been construed to refer to a variety of officials serving in a variety of settings outside the federal bankruptcy context. Courts that have applied section 6012(b)(3) outside bankruptcy have done so in two general categories of cases. The first is corporate liquidation or dissolution. A liquidating corporation continues in existence for tax purposes for so long as it has assets or conducts any activity, and section 6012(b)(3) ensures that its return will be filed by the fiduciary in charge of its affairs, variously termed a "liquidating receiver," a "trustee in dissolution," or a "liquidating trustee." However denominated, this individual is charged with winding up the corporation, liquidating its assets, and effecting its dissolution.[37]

[37] *See, e.g., Hersloff v. United States*, 310 F.2d 947 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 923 (1963) ("liquidating trustees" for dissolved corporation); *United States v. Loo*, 248 F.2d 765 (9th Cir. 1957), *cert. denied*, 356 U.S. 928 (1958) ("trustee in dissolution"); *First Nat'l Bank v. United States*, 86 F.2d 938, 942 (10th Cir. 1936) (trustee for dissolving corporation where "assignment [was] made to an alter ego for convenience"); *Tazewell Electric Light & Power Co. v. Strother*, 84 F.2d 327 (4th Cir. 1936) (trustee for dissolved corporation); *Whitney Realty Co. v. Commissioner*, 80 F.2d 429 (6th Cir. 1935), *cert. denied*, 298 U.S. 668 (1936) (same); *Northwest Utilities Securities Co. v. Helvering*, 67 F.2d 619 (8th Cir. 1933), *cert. denied*, 291 U.S. 684 (1934) ("trustees in dissolution"); *Hellebush v. Commissioner*, 65 F.2d 902 (6th Cir. 1933) (trustee for dissolved corporation); *Taylor Oil & Gas Co. v. Commissioner*, 47 F.2d 108 (5th Cir.), *cert. denied*, 283 U.S. 862 (1931) ("liquidating trustees"); *Smith v. Commissioner*, 26 B.T.A. 1178 (1932) (same). In each of these cases, the fiduciary was in unchallenged control of corporate affairs, and no one denied that if the corporation had to file a return, the fiduciary had to file it; the disputes concerned whether the corporation continued to exist and whether the fiduciary acted for it or for its shareholders. *Compare, e.g., Merchants Nat'l Bldg. Corp. v. Commissioner*, 45 B.T.A. 417 (1941), *aff'd*, 131 F.2d 740 (5th Cir. 1942), where a corporation retained its own management but set up a "liquidating trust" to hold some of its assets shortly before it dissolved; the court held that the "liquidating trust" had separate existence apart from the corporation. In *National Metropolitan Bank v. United States*, 345 F.2d 823 (Ct. Cl. 1965), a liquidating bank assigned its assets and liabilities to a *purchaser*; contrary to the Government's parenthetical (Br. 28 n.21), the holding was not that the assignee was a section 6012(b)(3) fiduciary (the bank had its own liquidating committee), but that the bank's tax existence survived the assignment for the purpose of taking certain deductions. *J. Ungar, Inc. v. Commissioner*, 244 F.2d 90 (2d Cir. 1957), also cited by the Government (Br. 28 n.21), held that a corporation continued in existence for purposes of recognizing income after assigning the bulk of its assets to its shareholder; the court specifically did *not* hold that the distributee shareholder "operated the corporation's business," and no other fiduciary was involved.

The second category of cases consists of equity insolvency proceedings or their equivalent, state-law "assignments for the benefit of creditors."[38] In such cases, section 6012(b)(3) applies to the "receiver" or "assignee" who is charged, outside the federal bankruptcy context, with the same duties as a "trustee in a case under title 11"—

[38] *See generally* 6A C.J.S. *Assignment for Benefit of Creditors* (1975); 21 C.J.S. *Creditor and Debtor* §§ 2-83 (1990). A general "assignment for the benefit of creditors" is treated as the functional equivalent of an equity insolvency proceeding under IRC § 6871(a), which authorizes the immediate assessment of taxes "[o]n the appointment of a receiver for the taxpayer in any receivership proceeding" before a state or federal court. *See Williams v. Commissioner*, 44 T.C. 673 (1965).

namely, operating the day-to-day business of a corporation in financial distress.[39]

The "receivers" and "assignees" involved in these two categories of cases share a single unifying characteristic: they functioned as *surrogates* for the corporate managers. The very first regulations issued under the statute explicitly recognize this fact:

> Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee * * * such receiver, trustee, or assignee *stands in the place of the corporate officers* and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control.

Regulations 33, Art. 209 (1918) (emphasis added).

Regulations issued in 1919 under provisions governing corporate liquidation likewise provided that receivers or trustees in dissolution "stand in the stead of the corporation" for the purpose of liquidating its assets and paying its debts, so that "[a]ny sales of property by them are to be treated as if made by the corporation." Regulations 45,

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[39] *See, e.g., Pinkerton v. United States*, 170 F.2d 846 (7th Cir. 1948) (receiver appointed to manage corporation); *Louisville Property Co. v. Commissioner*, 140 F.2d 547 (6th Cir.), *cert. denied*, 322 U.S. 755 (1944) (assignee under general assignment for benefit of creditors); *Kavanagh v. First Nat'l Bank*, 139 F.2d 309 (6th Cir. 1943) (receiver for insolvent bank); *State ex rel. Gibson v. American Bonding & Cas. Co.*, 225 Iowa 638, 281 N.W. 172 (1938) (court-appointed "liquidating receiver" in insolvency proceeding). In each of these cases, the corporation had no existence independent of the receiver or other fiduciary who managed it. In *United States v. McDonald & Eide, Inc.*, 670 F. Supp. 1226 (D. Del. 1987), *aff'd*, 865 F.2d 73 (3d Cir. 1989), also cited by the Government (Br. 28 n.21), the court held that the corporation no longer existed at all.

Art. 547 (1919). And referring to the original version of what is now section 6012(b)(3), this Court has ruled that "[t]he language of the section contemplates a *substitution* of the receiver for the corporation; and there can be such substitution only when the receiver is in complete control of the properties and business of the corporation." *North American Oil Consolidated v. Burnet*, 286 U.S. at 422-423 (citations omitted). Nothing in the subsequent development of the statute—whether by legislative change, regulatory interpretation, or judicial construction—has changed this basic requirement.

b. Respondent Smith is not a "receiver" or "assignee" as those terms are used in section 6012(b)(3) and the cases interpreting it. He is serving in a federal bankruptcy case, not in an equity insolvency proceeding. The corporations whose taxes are at issue have not been liquidated or dissolved. Quite the contrary: they have been successfully reorganized and have emerged from chapter 11 to embark on new profit-seeking activities. The liquidating trustee is not "a substitute" for, nor does he "stand in the place of," the officers of the reorganized corporations. Indeed, he has no power whatever to act for those corporations, which since October 1985 have been under the sole control of their own separate management. *See* Rev. Rul. 84-123, 1984-2 C.B. 224 (section 6012(b)(3) applies to a corporation "in receivership, in dissolution, or *in the hands of an assignee*") (emphasis added).

Relying in part on *Webster's Third New International Dictionary*, the Government contends (U.S. Br. 25-26) that the term "assignee" should be read to mean anyone "to whom a right or property is legally transferred." Under this interpretation, "assignee" would swallow up the other terms of the statute, making "receiver" and "trustee in a case under title 11" wholly redundant. This interpretation finds no support in the case law, in the history of the statute, or in standard principles of statutory construction. Congress clearly intended "receiver" and "as-

signee" to reach fiduciaries *in situations other than bankruptcy* who perform roles analogous to those of the statutory trustee in a federal bankruptcy case. Respondent Smith is serving in a federal bankruptcy case, and he is not the statutory trustee. If he is not required to file under section 6012(b)(3) as a "trustee in a case under title 11"—and we have shown that he is not—he is not required to enter through the back door and file as a "receiver" or "assignee."

C. No Other Statutory Provision Requires The Liquidating Trustee To Assume The Reorganized Debtors' Tax Obligations

Gould and his entities, while not abjuring section 6012(b)(3), place chief reliance on two statutory provisions outside the Internal Revenue Code: 28 U.S.C. § 960 and 31 U.S.C. § 3713. Both provisions are plainly inapposite; indeed, the Government does not urge either of them. Respondent Smith's brief, on which we rely, covers these points persuasively and comprehensively. We will supply the short answers only.

Section 960 does not impose any substantive tax obligation. It simply prevents a court-appointed officer from claiming *immunity* from an otherwise applicable tax. Respondent Smith is claiming no such immunity. Rather, he contends that the tax is not applicable to him in the first place, because he is not a person encompassed within section 6012(b).

Section 3713 is a federal priority statute. By its terms,it "does not apply to a case under title 11," where priorities are governed exclusively by the Bankruptcy Code. This is plainly "a case under title 11." If it were not, neither the bankruptcy court nor this Court would have jurisdiction over it. And there is no inconsistency between this proposition and our submission that respondent Smith is not "a trustee in a case under title 11." Lacking plenary powers to manage the debtors' business, respondent Smith is

not a "trustee in a case under title 11." But this case still arises under the Bankruptcy Code.

III. The Government's Policy Arguments Do Not Justify The Result For Which It Contends

The Government asserts that unless respondent Smith files tax returns for the reorganized debtors and pays their taxes, the taxes will never be collected. That is said to be so because, as the Solicitor General surmises, the reorganized debtors "evidently lack funds to satisfy the very substantial tax liabilities at issue" (U.S. Br. 13).

This argument cannot be countenanced, for two distinct reasons. First, there is not a bit of record evidence—the Solicitor General certainly cites none—to support either of the factual predicates underlying this argument. The Government, therefore, cannot properly advance it in this Court. Second, even if the requisite factual predicate existed, the argument would not show the correctness of the Government's construction of section 6012(b). Rather, it would show the need for the IRS to avoid repetition of the procedural lapses that generated the dilemma it hypothesizes.

A. The Government's policy argument has two factual predicates: that the tax liabilities at issue are "very substantial" and that the reorganized debtors "lack funds to satisfy" them. There is no evidence in the record to support either assertion.

The Solicitor General states (U.S. Br. 6 n.4) that he has been informed by the IRS that "it has now tentatively computed Holywell's [fiscal 1986 tax liability] to be in excess of $33 million." The debtors' brief similarly states: "According to the [IRS] agent's preliminary findings, the liabilities of the Holywell * * * and Gould estates [for fiscal 1986 and calendar 1985, respectively] total more than $35 million" (Holywell Br. 6 n.8). The record, however, contains no evidence of the *existence* of such an IRS audit,

much less of its outcome or of the facts that would be needed properly to determine the reorganized debtors' actual tax liabilities.[40]

In light of the Government's unsubstantiated claims of large tax liabilities, evidently based solely on unadjudicated IRS agent reports, it is appropriate to observe that Gould is a substantial real estate operator, and that such taxpayers and their related entities frequently have loss carryovers, depreciation, and other deductions that substantially reduce their gross income. Holywell has some 20 subsidiaries with whom it filed a consolidated federal income tax return for fiscal 1985. Nineteen of those subsidiaries did not petition for bankruptcy, and most of them have presumably continued their business operations throughout these proceedings. Without comprehensive knowledge of the tax affairs of Gould and the Holywell subsidiaries, it is impossible to say what (if any) actual tax bill might result when the trust-generated interest and capital gain or loss are combined with other items of income, deduction, and loss on the reorganized debtors' returns.

Although the Solicitor General asserts that the reorganized debtors "evidently lack funds" to satisfy whatever tax liabilities they may have, he cites no evidence to support that statement. Gould has been out of bankruptcy for six years, and the record contains no evidence about his current balance sheet. As for the corporate debtors, there is nothing in the record about what post-confirmation assets they have acquired. It was originally anticipated that

[40] Respondents have made written requests, both to the Solicitor General and to the debtors, for information concerning the supposed IRS audit of Holywell and Gould. The Solicitor General made no response to these requests. The debtors responded by inviting the liquidating trustee to send "an accountant from Arthur Anderson" to a meeting "with representatives of the Internal Revenue Service and the taxation agencies of the states of Florida and Virginia" at Gould's office on September 13, 1991—the last business day before respondents' briefs in this Court were due to be filed.

the trustee would finish his work quickly, and that the debtors would receive a substantial reversion from the liquidating trust. *See* pages 4 & 15-16, *supra*. Although the debtors' litigiousness has made both the timing and the amount of the reversion uncertain, it is surely true that reorganized corporations *normally* have positive net worth. *See generally* 5 L. King, *Collier on Bankruptcy* ¶ 1129.02[11], at 1129-53 (15th ed. 1991). Section 1129(a)(11) of the Bankruptcy Code makes it a condition of confirming a chapter 11 plan that confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor."

In short, there is no record evidence to support the Solicitor General's assertion that the reorganized debtors "evidently lack funds to satisfy the very substantial tax liabilities at issue." The Court should therefore decline to consider his argument that the reorganized debtors' taxes, if not collected from the trust, cannot be collected at all.

B. Even if the Solicitor General's argument were cognizable in this Court, it would be misdirected. It is a factual argument peculiar to this case. If practical collection problems do exist as to the particular debtors here—and there is no evidence that they do—that would not be a reason to embrace the Government's anomalous statutory argument, which would apply perforce to all chapter 11 reorganizations.

Especially is that so because the problem of which the Government complains, if real, is one of its own making. The IRS in this case had fully satisfactory means of ensuring collection of whatever taxes are due. Having failed to take advantage of those practical opportunities, it cannot reasonably complain of the consequences.

Rule 2002(j) of the the Bankruptcy Rules requires the clerk of the bankruptcy court to notify the IRS of all stages of a title 11 proceeding. The IRS received such notice here (Pet. App. 30a). It was listed as a creditor (*id.*

at 30a) and received timely notice of the claim bar date (Bank App. B42). It filed numerous proofs of claim, which ultimately yielded it a distribution of approximately $2.3 million (Bankr. C.P. 1254). (Another IRS proof of claim, in the amount of $3.4 million for 1980 taxes, was filed nine months late and struck as untimely. Bank. App. B42-B48). The IRS received copies of the competing plans and disclosure statements—which clearly indicated that Miami Center was to be sold and the proceeds distributed to creditors—and it was notified of the confirmation hearing (Pet. App. 30a). Standard IRS procedures require its personnel to review all proposed reorganization plans.[41] As the bankruptcy court explicitly found, the IRS had ample opportunity "to object and be heard on the terms proposed in the plans * * * and to appeal from the order of confirmation" (Pet. App. 30a).

The IRS is no ordinary creditor; its claims are accorded deference in bankruptcy proceedings.[42] The IRS's concerns about collection would surely have received careful and responsive attention had they been timely raised. The IRS could have voiced, at the pre-confirmation hearing, whatever doubts it had about collectibility of the taxes at issue. It could have introduced evidence about the expected size of the debtors' tax liabilities and their respective abilities to pay—matters about which the Solicitor General now can only speculate. If the bankruptcy court were satisfied that these concerns had substance, appropriate measures (such as creation of a tax reserve within the liquidating trust) could have been implemented.

In the absence of such protective measures, the IRS could rightfully have objected to confirmation of the plan.

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[41] Internal Revenue Manual § 57(13)5.3 (reprinted in Bank App. B27-B30).

[42] *See* 1 L. King, *Collier on Bankruptcy* ¶ 8.03 (15th ed. 1991). *See also United States v. Energy Resources Co.*, 110 S.Ct. 2139, 2142 (1990) (discussing priority and dischargeability of federal tax claims).

Any party may object if the plan is "likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor" (BC § 1129(a)(11)). Those circumstances would presumably exist if—as the Government asserts is true here—a plan leaves the reorganized debtors with substantial tax liabilities and insufficient assets to meet them. In addition, any governmental unit may object to a plan if its "principal purpose * * * is the avoidance of taxes" (BC § 1129(d)).[43]

Had the IRS presented its concerns when the plan was being considered for approval, its request would have avoided the abstract and rigid quality of its present attack on the bankruptcy court's approval of the plan. The Government's collection-based concerns would have been considered by the bankruptcy court in a concrete, fact-finding context. The actual tax liabilities of Gould and his multiple corporations could have been examined. Procedures could have been established to ensure full disclosure by the debtors of information necessary for the court to determine these matters. And, if modifications to the plan were judged appropriate, the creditors could have evaluated the

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[43] Significantly, the IRS here was in a far better position than it would have occupied if the debtors had executed the same debt-reduction steps outside of bankruptcy court. Absent the chapter 11 proceeding, the debtors might have sold their real estate, used the proceeds to pay creditors, and filed timely tax returns without paying the taxes due. Lacking prior notice, the IRS then would have been limited to using its normal tax-collection tools after the tax returns were filed. Similarly, if the Bank had foreclosed on Miami Center, the IRS would not have been party to the foreclosure proceeding and would have had no claim against the proceeds of sale. In contrast, the debtors' bankruptcy petitions resulted in the IRS's receiving advance notice, ample opportunity to review the plan before confirmation, and the ability to seek its amendment with a view to assuring collection of any post-confirmation taxes. If the IRS faces collection difficulties today, those difficulties are directly traceable to its "serious procedural mistake" in failing timely to voice its concerns in this case. Sheppard, 51 Tax Notes 161 (Apr. 15, 1991).

plan, as modified, in light of the impact that any special tax arrangements had on their recovery.

Having failed to raise its collection-based objections in a timely fashion, the IRS now seeks to collect the debtors' taxes from funds that the plan of reorganization explicitly reserves for *other creditors*. If this mode of collection is permitted, it will have extremely unsettling effects on the bankruptcy process. That process is one of negotiation and compromise; the IRS should not be permitted to absent itself from the negotiating table and then demand a form of "super-priority" payment after the plan has been confirmed. Creditors' votes to confirm a plan are premised on the belief that it provides a fixed sum of money to meet their claims. If the IRS can sit on its hands and raid the pot after their votes are cast, bankruptcy reorganizations will be neither predictable nor just.

The Bankruptcy Code establishes clear procedures by which *all* creditors may protect their rights. The IRS neglected to follow those procedures. Whatever may explain the Government's failure to act in this case, it has not demonstrated, either legally or factually, the existence of a "loophole of troubling proportions" (U.S. Br. 13-14) that it could not, by itself, have closed through proper diligence.

Repeated use of the federal bankruptcy process has become common in our society, particularly in view of current economic conditions. To disentangle the competing claims of the different parties, a fair and practical regime must be followed which respects the orderliness and discipline mandated by the Bankruptcy Code. Respondents' interpretation of the relevant statutes not only meets this standard, but closely tracks this Court's emphasis on the need to keep in mind the "relevant periods [of the bankruptcy process] to be considered." *Nicholas v. United States*, 384 U.S. at 686.

Here we are dealing with the post-confirmation period of plan implementation, not the pre-confirmation period of

estate administration. And here we are dealing with an interim "liquidating trustee," appointed after confirmation, whose duties are limited to implementing the plan and returning to the reorganized debtors any assets remaining after creditors are paid. This case clearly does not involve a pre-confirmation statutory trustee who steps into management's shoes and exercises plenary power to manage the debtors' business.

Under these circumstances, the courts below correctly interpreted both the plan and the applicable statutes as not requiring the liquidating trustee to assume the post-confirmation tax responsibilities of the reorganized debtors.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

Non-Debtor Affiliates Related to the Debtors for Federal Income Tax Purposes

Source: Debtors' Schedules and Statements of Affairs (Bankruptcy Court Papers 275-278)

Affiliate	Debtor and Nature of Interest	Property/Business
1. Miami Center Joint Venture (Florida general partnership)	50% (Gould)	Development of vacant parcels in downtown Miami adjoining "Miami Center"
2. Eleven Dupont Circle Associates, District of Columbia Limited Partnership	0.295% (Gould) 29.205% (Holywell)	Office building at Eleven Dupont Circle
3. Dupont Land Associates, District of Columbia Limited Partnership	0.295% (Gould) 29.205% (Holywell)	Land at Eleven Dupont Circle
4. 1616 Reminc Limited Partnership, a Virginia Limited Partnership	0.004% (Gould) 0.396% (Holywell)	Arlington, Virginia Office Building
5. 1616 Arlington Associates, a Virginia Limited Partnership	0.03% (Gould) 29.7% (Holywell)	Arlington, Virginia Office Building

6. 1300 N. 17th Street Associates, a Virginia Limited Partnership	6.332% (Gould) 13.330% (Holywell)	Arlington, Virginia Office Building
7. Great Western Bank Building Limited Partnership	0.3% (Gould) 29.7% (Holywell)	Office Building
8. 1333 New Hampshire Associates	4.0% (Gould)	Office Building
9. Corpus Christi Associates	1.0% (Gould) 49.0% (Holywell)	Unknown
10. Parkwell, Inc.	100% (Holywell)	Parking Concession
11. Twin Development Corp.	100% (Holywell)	Corporate general partner for Washington, D.C. Partnership
12. Charleston Center Corp.	100% (Holywell)	Charleston, South Carolina development
13. Whitehall Security Corp.	100% (Holywell)	Security services
14. Holywell Leasing Company	100% (Holywell)	Equipment leasing
15. PBA, Inc.	100% (Holywell)	Architectural services
16. Holywell Management of Washington, D.C.	100% (Holywell)	Building management
17. Holywell Construction Company	100% (Holywell)	Construction

18. Orion Mechanical Services, Inc.	100% (Holywell)	Building engineering services
19. Studley-Holywell Associates, Inc.	50% (Holywell)	Brokerage
20. NHA Corporation	66.6% (Holywell)	Corporate general partner, Washington, D.C. Partnership
21. Whitehall Building Services, Inc.	100% (Holywell)	Building services
22. Parkwell of Florida, Inc.	100% (Holywell)	Parking concession (Florida)
23. Orion Engineering of Florida, Inc.	100% (Holywell)	Building engineering (Florida)
24. Holywell Telecommunications Co.	100% (Holywell)	Telecommunications equipment and services
25. Holywell Hotels, Inc.	100% (Holywell)	Hotel management
26. Holywell Management of Florida, Inc.	100% (Holywell)	Management services
27. Holywell Insurance Services, Inc.	100% (Holywell)	Insurance
28. Whitehall Security Corp. of Florida	100% (Holywell)	Security (Florida)
29. Orion Cleaning Services of Washington, Inc.	100% (Holywell)	Building maintenance